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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 525

ALLEGHANY CORPORATION,
Petitioner,

against

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, ET AL.,
Respondents.

PETITION OF ALLEGHANY CORPORATION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Dated: January 11, 1952.

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Abbreviations And References Used In This Petition And Brief

P.R. I —Printed Transcript of Record in Circuit Court Appeals Nos. 12,130—12,136, inclusive.

P.R. II —Printed Transcript of Record in Circuit Court Appeals Nos. 13,367—13,369, inclusive, and 13,371—13,373, inclusive.

P.R. III —Printed Transcript of Record in Circuit Court Appeals Nos. 14,264—14,274, inclusive. (By stipulation (P.R. III, pp. 1093-1094), the records on appeal in Appeals Nos. 12,130—12,136, inclusive, and in Appeals Nos. 13,367—13,369, inclusive, and 13,371—13,373, inclusive, were made part of the record on appeal in Appeals Nos. 14,264—14,274, inclusive).

P.R. IV —Printed Volume containing:

1. Circuit Court mandate, dated September 9, 1947, referring proceedings back to District Court.
2. District Court Order No. 3160, entered September 19, 1947, referring proceedings back to Commission.
3. Petition of George H. Walker *et al.* (No. 756-A) and Petition of Irving Trust Company (No. 757), filed in District Court March 23, 1937.

P.R. V —Printed Transcript of proceedings in the United States Court of Appeals for the Eighth Circuit on Appeals Nos. 14,256 and 14,264—14,274, inclusive, including that Court's opinion and judgment of August 14, 1951.

D.C.R. —Volume LII of the Record of the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, In the Matter of Missouri Pacific Railroad Company, Debtor, In Proceedings for the Reorganization of a Railroad, No. 6935, which Volume contains the Fourth Supplemental Report dated August 2, 1949 and Fifth Supplemental Report and Order, both dated December 29, 1949, of the Interstate Commerce Commission, embodying the present plan of the Missouri Pacific System.

Circuit Court —United States Court of Appeals for the Eighth Circuit.

Commission —Interstate Commerce Commission.

District Court —District Court of the United States, Eastern Division, Eastern Judicial District of Missouri.

Gulf Coast Lines—New Orleans, Texas and Mexico Railway Company and subsidiaries, except IGN.

IGN —International-Great Northern Railroad Company.

MOP System —Missouri Pacific Railroad System, including the MOP, Gulf Coast Lines, and IGN.

MOP —Missouri Pacific Railroad Company.

NOTM —New Orleans, Texas and Mexico Railway Company.

Plan —Plan of Reorganization of the Missouri Pacific System embodied in the Interstate Commerce Commission's Fifth Supplemental Order of December 29, 1949 in Finance Docket No. 9918.

S.S. —Summary Statement.

Exhibits offered in evidence before the Interstate Commerce Commission are referred to as Commission Exhibits. Exhibits offered in evidence before the District Court are referred to by the name of the party offering them, and Exhibits offered in evidence before the District Court at the hearing on confirmation of the Plan, on June 25-28, 1951, are referred to as Confirmation Exhibits. References are to page numbers except in the case of Exhibits.

Cases

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GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Alleghany Corporation, being the owner of 8,000 shares of common stock of MOP, respectfully prays for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit entered August 14, 1951 (P.R.V., pp. 14-36) and the judgment entered thereon (P.R.V., pp. 37-40), which affirmed Order No. 3571 of the District Court entered October 3, 1950 (P.R.III, pp. 948-954), in proceedings to reorganize the MOP and subsidiary debtors, under Section 77 of

the Bankruptcy Act. District Court Order No. 3571 approved a plan of reorganization for the MOP and subsidiary debtors, adopted the findings and conclusions of the Commission with respect to such plan as the findings and conclusions of the District Court, approved such plan in all respects, overruled all objections thereto and denied all claims for equitable treatment. Since the District Court adopted the findings and conclusions of the Commission contained in the Commission's Fourth and Fifth Supplemental Reports, and since the Circuit Court affirmed the order of the District Court, all references to the action of the Commission apply equally to the action of said Courts.

Petitioner seeks a review of the propriety of the Commission's findings that the maximum permissible capitalization of the MOP System for reorganization purposes should be limited to approximately $612,000,000, and that, as a consequence, the equity of the holders of MOP common stock is without value and that such holders should not be participants in any reorganization. Since such a review will require a consideration of the vital factual highlights at the very least, the Summary Statement will be somewhat more extended than usual, but not more than the importance and the nature of the questions presented require. Also, because the Commission considered the MOP System's income through most of the year 1949 (D.C.R., p. 28686) and the Circuit Court had before it such income figures for the year 1950 (P.R.V., p. 51), but did not consider or have before it many other material factors bearing on the valuation and maximum permissible capitalization of the MOP System for such years, Petitioner begs leave to refer to subsequent proceedings affecting the Plan in order that this Court may properly weigh the other pertinent factors.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, U. S. Code, Section 1254(1) and Title 11, U. S. Code, Section 47c (Section 24c of the Bankruptcy Act).

Opinions Below

The Commission's Fourth and Fifth Supplemental Reports, embodying the plan, are set forth in 275 I.C.C. Reports, beginning at pages 59 and 203, respectively.*

The District Court's opinion on the Plan is reported at 93 F. Supp. 832. The Court of Appeals' opinion is reported in 191 F. 2d 265.

Summary Statement

1. The proceedings in the District Court were instituted by the filing therein, on March 31, 1933, of petitions by MOP, by NOTM, and by IGN, stating their desire to effect a plan of reorganization pursuant to Section 77 of the Bankruptcy Act, and the approval, on that date, of such petitions by the District Court (P.R.I., 2328-2329). Subsequently the other debtors filed similar petitions in such proceedings, which petitions were approved by the District Court (P.R.I., pp. 2329-2330). The railroads involved in these proceedings consist of (1) the MOP and seven wholly-owned subsidiaries (P.R.I., p. 303), (2) NOTM and fourteen wholly-owned subsidiaries

* Commission Reports with respect to previous plans of reorganization in these proceedings are as follows:

Date of Report	*Reference*
January 10, 1940	239 I.C.C. 7
April 9, 1940	240 I.C.C. 15
July 4, 1944	257 I.C.C. 479
December 9, 1944	257 I.C.C. 745

(P.R.I., p. 305), and (3) IGN and its wholly-owned subsidiary (P.R.I., pp. 308-309). In addition the plan provides that the properties of two non-debtor subsidiaries of the MOP are to be transferred to the new company (D.C.R., p. 28693). Approximately 93% of NOTM's capital stock is owned by MOP (D.C.R., p. 28476) and all of IGN's capital stock is owned by NOTM (D.C.R., p. 28477).

2. On October 21, 1935, MOP, NOTM, and IGN filed with the District Court a plan for their reorganization and the various subsidiary debtors involved in these proceedings (P.R.I., p. 2330). Such plan was subsequently filed with the Commission, as were other plans (P.R.I., pp. 2330-2331). Hearings on plans of reorganization were commenced by the Commission on February 4, 1936 (P.R.I., p. 634), and continued intermittently until September 30, 1937. The matter was submitted to the Commissioner on March 23, 1939 (P.R.I., p. 298) and the Commission issued its Original Report under date of January 10, 1940 (P.R.I., p. 298), approving a plan of reorganization. In such Original Report and in its First Supplemental Report of April 9, 1940 (P.R.I., p. 483) the Commission fixed the total permissible capitalization of the new company at approximately $560,000,000 (P.R.I., pp. 407 and 498). Hearings on such 1940 plan of reorganization were held before the District Court on July 9, 1940 (P.R.I., p. 2155), and on October 7-10, 1940 (P.R.I., p. 2280). Thereafter, the District Court filed its opinion dated June 20, 1941 (P.R.I., p. 2328) and its order dated July 12, 1941 (P.R.I., 2355; 39 F. Supp. 436), approving the 1940 Commission plan, with minor corrections not here material. Appeals were taken to the Circuit Court, and, without deciding the appeals on the merits, on May 8, 1943 the Circuit Court remanded the appeals to the

District Court to determine whether the 1940 plan should be referred back to the Commission (P.R.II., p. 48). Further hearings were held before the District Court on July 16, 1943 (P.R.II., p. 50), and on July 29, 1943 the District Court referred the matter back to the Commission (P.R.II., pp. 124-127; 50 F. Supp. 936).

3. Further hearings were conducted by the Commission on October 19, 20 and 21, 1943 (P.R.II., p. 128). The Commission issued its Second Supplemental Report under date of July 4, 1944 (P.R.II., p. 652) and its Third Supplemental Report on October 9, 1944 (P.R.II., p. 783). It declined to increase the maximum permissible capitalization above the $560,000,000 originally set by it in 1940 (P.R.II., pp. 714-715).

4. Hearings were held before the District Court on the 1944 plan during the first part of 1945 (P.R.II., pp. 917-923), and on January 22, 1946 (P.R.II., pp. 1119-1123; 64 F. Supp. 64) the District Court approved the 1944 plan. Appeals again were taken, and on September 9, 1947, without deciding the case on the merits, the Circuit Court vacated the District Court's approval order and remanded the cause with directions to return the 1944 plan to the Commission (P.R.IV.; 163 F. 2d 1022).

5. The Commission held hearings on plans on March 23-26, 1948 (P.R.III., p. 5), and issued its Fourth Supplemental Report on August 2, 1949 (D.C.R., p. 28469) and its Fifth Supplemental Report on December 29, 1949 (D.C.R., p. 28460), approving a modified plan of reorganization. After hearings on March 27—April 1, 1950 (P.R.III., p. 560) the District Court, by opinion filed July 29, 1950 (P.R.III., p. 915; 93 F. Supp. 832), and order No. 3571 filed October 3, 1950 (P.R.III., p. 948), approved the Commission's 1949 plan. The Circuit Court affirmed the judgment of the District Court on August 14, 1951 (P.R.V., pp. 14-36, 37; 191 F. 2d 265).

6. In its Fourth and Fifth Supplemental Reports and Fifth Supplemental Order the Commission found that the equity of the holders of Missouri Pacific common stock is without value and that such holders should not participate in the reorganization (D.C.R., pp. 28592-28593, 28668-28670), and that "Alleghany Corporation on the basis of its present holdings of Missouri Pacific securities will have no interest in the reorganized company" (D.C.R., p. 28605). The Commission also found that "a reasonable future normal year's earnings available for payment of interest" will be $25,450,000 for the MOP System (D.C.R., p. 28545), and limited the new system capitalization to $612,000,000 (D.C.R., p. 28556), inclusive of equipment obligations as of January 1, 1948 but exclusive of Plaza-Olive bonds and new securities distributable to general unsecured creditors.

This Court's attention is also called to the following: On July 13, 1951 the Institutional Group, and others, filed a petition with the District Court, praying for a Commission hearing and report on "changes, facts and developments" pursuant to Section 208(a)(1) of the Bankruptcy Act, and on the same date the District Court referred the petition to the Commission. Replies to the petition were filed, and hearings were held by the Commission on November 27-December 3, 1951. Such matter is still pending before the Commission.

Significance of the dates involved in the Commission's original report of January 10, 1940.

7. As stated above, the Commission held its first reorganization hearings on February 4, 1936 (P.R. I, p. 634), the issues were submitted March 23, 1939 (P.R. I, p. 298) and the Commission issued its Original Report on January 10, 1940 (P.R. I, p. 298; 239 I.C.C. 7). These dates are peculiarly significant because the Trustee's agents and

the Commission throughout these proceedings have been unduly influenced in their estimates and judgments by the depression conditions and particularly the earning record of the MOP System during this period.

The average weighted railroad construction cost index for Region VIII of the United States, which Region includes the territory in which the MOP System operates, for the years 1938 and 1939 was 150, the lowest since 1917, except for the years 1931 to 1936 inclusive, when it averaged 140.8. In 1935, during the preparation of the first proposed reorganization plans and supporting data, the System's earnings of $5,998,523 (P.R. I, p. 333) available for interest reached their lowest point in the 25-year period 1925 to 1950 inclusive (P.R. I, pp. 333-334; P.R. II, pp. 659-660; D.C.R., pp. 28531-28532; Debtor's Exhibit No. 1, introduced in evidence before District Court, March 1950, P.R. III, p. 775; P.R. V, p. 51). Similar earnings of $7,600,435 for 1938 (P.R. I, p. 334) and $10,097,423 for 1939 (P.R. II, p. 659) were the second and third lowest in this 25-year period. It is Petitioner's contention that the Commission in its Original Report of January 10, 1940 was unduly influenced by these depression conditions in finding that the MOP System's permissible maximum capitalization should be limited to $560,000,000; that the Commission in adding $52,000,000 (by increasing the capitalization to $612,000,000) to the capitalization in its Fourth and Fifth Supplemental Reports of 8/2/49 and 12/29/49 arbitrarily ignored the enormous changes in the System's physical values since 12/31/35 and its vastly improved earning record and earning capacity since 1939, and failed to increase the capitalization sufficiently to even partially compensate for the reduction in the composite average yields on Railroad bonds from 12/31/35 to 12/31/49 inclusive; and that the underlying physical values and income factors upon which the Commission based its original capitaliza-

tion, improperly controlled the capitalization fixed in its Fourth and Fifth Supplemental Reports. This is graphically presented in Appendix B hereof.

Property Valuation Data for the System

8. The Report of the Commission's Bureau of Valuation which fixed the elements of value for the MOP, the Gulf Coast Lines and the IGN, separately and combined as a system as of 12/31/35, was filed in the 1936 Commission hearing (P.R. I, p. 215). The Railroad Construction Indexes, issued August 1, 1951, and compiled by the Engineering Section of the Bureau of Valuation of the Interstate Commerce Commission for Region VIII which Region includes the territory in which the debtor railroads operate, lists the weighted average yearly cost index factors for the period 1915 to 1950 inclusive as follows:

1915:	'16:	'17:	'18:	'19:	'20:	'21:	'22:	'23:	'24:	'25:	'26
103 :	112:	139:	170:	187:	219:	175:	158:	176:	172:	168:	168
'27 :	'28:	'29:	'30:	'31:	'32:	'33:	'34:	'35:	'36:	'37:	'38
168 :	164:	166:	160:	148:	137:	134:	140:	143:	143:	152:	150
'39 :	'40:	'41:	'42:	'43:	'44:	'45:	'46:	'47:	'48:	'49:	'50
150 :	153:	164:	186:	198:	198:	207:	227:	252:	278:	279:	284

This is an average of 149.2 for the period 1928 to 1940 inclusive, 151 for the period 1938 to 1940 inclusive, and 227.3 for the period 1941 to 1950 inclusive.

Commission's valuation of the System as of 12/31/35.

9. The Commission in its Original Report, decided January 10, 1940, adopted the physical valuations of its Bureau of Valuations and found the following elements of value as of 12/31/35 for the System, including four small companies: Cost of reproduction less depreciation

$433,772,838 (P.R. I, p. 340); value of lands and rights $50,966,605 (P.R. I, p. 340); working capital $8,478,200 (P.R. I, p. 340); and four small companies $3,214,861 (P.R. I, p. 345), making an overall valuation of $496,-432,504. The Commission also gave consideration to $60,150,487 book value (P.R. II, p. 711) of investments in affiliated companies.

Commission's valuation of the System as of 12/31/45 and '46.

10. Throughout the proceedings from January 10, 1940 until its Fourth Supplemental Report decided August 2, 1949 the Commission adhered to these valuations (P.R. II, p. 710). In its Fourth Supplemental Report it adopted the physical valuations of its Bureau of Valuation, which, although represented as the elements of value as of December 31, 1945, were based on a pre-war cost factor of 152 (P.R. III, p. 159) as against a cost factor of 197 prevailing in 1945 and 227 in 1946. (The correct 1946 cost factor of 227 (D.C.R., 28667-28668; P.R. III, p. 158) is 115% of the correct 1945 cost factor, which would therefore be 197.) The Commission found the following elements of value for the System as of 12/31/45 and '46: Cost of reproduction less depreciation $471,544,764 as of 12/31/45 (D.C.R., p. 28512), plus $70,731,714 (D.C.R., p. 28513) to give effect to the increased prices alleged to prevail in 1946, making a total reproduction cost less depreciation of $542,276,478 as of 12/31/46; value of lands and rights $54,076,127 as of 12/31/45 (D.C.R., p. 28512); working capital $14,475,932 (D.C.R., p. 28512); net additions and betterments from the period 12/31/45 through 12/31/47 in the amount of $28,634,748 (D.C.R., pp. 28512-28513); making an overall valuation of $639,463,285 (D.C.R., p. 28513). The Commission allegedly also gave consideration

to estimated value of System investments of $73,498,933 as of 12/31/47 (D.C.R., p. 28513).

If the Commission instead had applied the 1946 cost index factor of 227 (which is comparable to an average of 227.3 for the 10-year period 1941 to 1950 inclusive), it would have resulted in a comparable System reproduction cost less depreciation of $704,016,332 and an overall valuation of $801,203,139. Although the Commission Bureau of Valuation does not maintain period price indexes for regions and for the United States as a whole (such indexes being tailor-made for each occasion), the Commission refused to apply the cost index factor of 227 to find the elements of value as of 1946 for the System on the ground that it was a "spot multiplier" (D.C.R., p. 28668). It considered the earning record of the System for 1945 through most of 1949 inclusive, but failed to consider or mention that the cost index factor increased from 197 (see p. 9 hereof) to 279 (see p. 8 hereof) between 1945 and 1949 inclusive. It thus weighed the earnings factors for the period against an inadequate cost and valuation background, thereby deprecating the inadequacy of the prevailing freight and passenger rates which so vitally affect the "earning power" and reorganization value of a railroad.

Valuation of the System as of 12/31/50, if the cost factor used in Ex Parte 175 is applied.

11. The Commission has belatedly and partially recognized the inadequacy of its valuation figures in Ex Parte 175, a freight rate proceeding. In Exhibit 15, Ex Parte 175, entitled "Interstate Commerce Commission, Bureau of Valuation, Elements of Value of Property used in

common-carrier service January 1, 1950," the following valuation formula was adopted:

> "The established level of these period prices contemplate 'tunnelling through' the post-war price peaks substantially above the 1936-1940 depression pre-war level and about 20 to 25 percent below the 1949 spot price levels. * * * Because of present world conditions we would recommend period prices as of December 31, 1950—about 10 per cent higher than those in this estimate."

The use of this formula based on a 20% reduction from 1949 so-called "spot price" levels plus 10% to reflect so-called period prices as of 12/31/50, would require the use of a cost factor of 245.5 (279—20%+10%) in computing the System's reproduction cost less depreciation as of 12/31/50, which, if applied to the Commission's reproduction cost less depreciation figure of $471,544,764 (D.C.R., p. 28512) as of 12/31/45, would produce a System reproduction cost less depreciation of $759,894,387 as of 12/31/50 and, after the addition of the following pertinent elements of value as of 12/31/50, an overall valuation of $1,094,128,515: $122,625,023 net additions and betterments from 12/31/45 to 12/31/50 (Alleghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56); $54,076,127 value of lands and rights (D.C.R., p. 28512); $86,269,666 estimated value of investments as of 12/31/50 (Independent Directors Confirmation Exhibit No. 3, Confirmation hearing transcript June 27, 1951, p. 276); and net current assets of $71,263,312 (Alleghany Confirmation Exhibit No. 5, Confirmation hearing transcript June 26, 1951, p. 54).

Selected Facts Bearing on Valuation

12. The System's *net* additions and betterments from 12/31/35 to 12/31/50 amounted to $201,936,737 (Alle-

ghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56), which is 40.68% of the Commission's System valuation of $496,432,504 as of 12/31/35. (See p. 9 hereof.) The three years 1948-1950 totalling $93,990,275 (Alleghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56) of this 15-year period account for 46.54% of such net additions and betterments, although the three-year period represents only 20% of the entire period.

(a) If the System's net additions and betterments from 12/31/35 to 12/31/47 inclusive, amounting to $107,946,462 (Alleghany Confirmation Exhibit No. 8, Confirmation hearing transcript June 26, 1951, p. 56), are added to the Commission's valuation figure of $496,432,504 (see p. 9 hereof) as of 12/31/35, the resulting valuation figure becomes $604,378,966, as contrasted with the Commission's comparable valuation figure of $639,463,285 (D.C.R., p. 28513). Thus, the Commission in its Fourth and Fifth Supplemental Reports, dated respectively 8/2/49 and 12/29/49, only increased its 1935 valuation figure by 5.8% to compensate for the increased cost factors, whereas between 12/31/35 and 12/31/47 the cost index factor had increased 75%.

Furthermore, although the Commission recommended the remand of its 1944 plan for reconsideration, due to a net System debt reduction of $45,463,961 (D.C.R., p. 28471) between 1/1/43 and 1/1/48, it in reality only increased its System valuation figure $35,084,319 in its Fourth and Fifth Supplemental Reports to compensate for all the elements affecting increases in value since the depression year of 1935, including the debt reduction and the increased cost factors.

(b) If the System's total net additions and betterments of *$201,936,767* (Alleghany Confirmation Exhibit No. 8,

Confirmation hearing transcript June 26, 1951, p. 56) for the period from 12/31/35 to 12/31/50 inclusive are added to the Commission's valuation of $496,432,504 as of 12/31/35 (see p. 9 hereof), resulting in $698,369,271, the Commission's valuation of $639,463,286 as of 12/31/46 (D.C.R., p. 28513) completely ignores $58,905,985 of net additions and betterments since 12/31/35 and all increased costs since that date, in spite of the fact that the average weighted cost index factor from 12/31/35 to 12/31/50 inclusive has increased 99%.

(c) These figures do not take into consideration the difference in the value of the System's investments in affiliated companies nor the difference in the System's net quick assets during the period 12/31/35 to 1950, inclusive. The Commission valued such investments at $60,150,487 (P.R. II, p. 711) as of 12/31/35 and at $73,498,933 (D.C.R., p. 28513) as of 12/31/47, as contrasted with an estimated value made by the financial agent of the Trustee of $86,269,666 (Independent Directors Confirmation Exhibit No. 3, Confirmation hearing transcript June 27, 1951, p. 276) as of 12/31/50. The net current assets of the System increased from a deficit of $133,875,751 as of 12/31/36 (P.R. I, p. 338) to $62,585,991 as of 12/31/47 (D.C.R., 28509), and $71,263,312 as of 12/31/50 (Alleghany Confirmation Exhibit No. 5, Confirmation hearing transcript June 26, 1951, p. 54).

(d) The improvement of the System's property and equipment since 1935 as a result of the additions and betterments as above indicated, and maintenance expenditures of more than $800,000,000 (Independent Directors Confirmation Exhibit No. 2, Confirmation hearing transcript June 27, 1951, pp. 271-272), has put the System in excellent physical condition, the best in 26 years (P.R. III,

p. 47) and will enable the System to earn a greater rate of return than heretofore on such improvements. The following limited examples merely highlight the vast expansion and improvement of the System's properties and facilities: Installation, where practicable, of centralized traffic control which is equivalent to providing a double track (Confirmation hearing transcript June 27, 1951, pp. 210-211); adoption of a dieselization program which by the end of 1951 will result in an estimated annual saving of $13,304,700 (Confirmation hearing transcript June 28, 1951, pp. 377-380); modernization of passenger equipment and installation of heavier rails, shorter and permanent steel bridges and creosoted ties and bridge material and grade reductions (P.R. III, pp. 47-53; Commission Exhibit No. 975; P.R. III, p. 783, Debtor's District Court approval hearing Exhibit No. 4).

(e) The only evidence introduced in the March 1948 hearings before the Commission as to the nature and permanence of the post-war price increases was that of Doctor Theodore Yntema to the effect that he did not expect a depression comparable to that in the thirties in the next 20 or 30 years (P.R. III, pp. 152-154), and that it is unlikely that non-agricultural price levels in the next ten years will average as much as 10% below the levels prevailing at the time he testified (P.R. III, p. 156).

The 1936 "Normal Year" Forecast

13. The so-called "Normal Year" forecast (Commission Exhibits Nos. 242, 374; P.R. I, pp. 747-749, 999-1000) was the result of a study made by Mr. C. E. Perkins, Chief Traffic Officer, MOP Lines, and other agents of the Trustee in 1935 (Commission Exhibits Nos. 243, 244, 245, 246, 247; P.R. I, pp. 751, 773-815) with respect to the traffic volume and revenue, pertaining to separate

commodities classified in the following five main commodity groups: Group I—Agriculture; Group II—Animals and Products; Group III—Products of Mines; Group IV—Products of Forests; and Group V—Manufactures and Miscellaneous. The study also covered overall costs and earnings available for fixed charges. The fundamental concept of the "Normal Year" forecast made it inappropriate as a basis for making the required statutory finding of "the probable prospective earnings" of the System. The "Normal Year" forecast was prepared and presented to the Commission in the depth of the world's worst depression. The System's income available for interest had declined from a high of $34,173,017 in 1929 to $5,998,523 in 1935 (P.R. I, p. 333). The earnings available for fixed charges for 1939, the year in which the Commission formulated its original plan, were only $10,097,423 (P.R. II. p. 659), the third lowest since 1925. *Mr. Perkins testified that the average conditions in 1930 and 1931 were pretty close to normal* (P.R. I, pp. 1140, 1142), *that the forecast did not represent the maximum level of future traffic, but that, on the contrary, after the "Normal Year" is reached there will be a somewhat steady growth in traffic as there has been in past normal periods* (P.R. I, p. 778). The "Normal Year" forecast did not even approach the author's idea of a normal year, since the System's income available for interest in 1930 was $28,217,274 and in 1931 was $23,321,317 (P.R. I, p. 333), making an average of $25,769,295. Furthermore the "Normal Year" forecast made no provision for the predicted normal growth (P.R. I, pp. 846, 1190-1191).

14. The forecast of traffic volume was primarily based on the average traffic conditions prevailing during the 7-year period (1928-1934) (P.R. I, pp. 774-775, 778-779, Commission Exhibits Nos. 244, 245, 246, 247) and the revenue forecast was preponderantly based on conditions

prevailing in 1934 and 1935 (P.R. I, pp. 774-775, Commission Exhibits Nos. 244, 245, 246, 247). In spite of the fact that the earnings for the years which Mr. Perkins regarded as *about normal* were on the average greatly in excess of the "Normal Year" estimated earnings, the Commission in its Original Report of January 10, 1940 adopted the "Normal Year" forecast of $20,412,204 (P.R. I, pp. 747-749, Commission Exhibit No. 242) (revised to $22,059,052 (P.R. I, p. 335) to reflect adjustments that in no way altered the full acceptance of the "Normal Year" traffic and revenue forecast) as measuring the "*earning power*" of the System. Within two years thereafter the System's earnings available for fixed charges more than tripled the 1939 earnings and subsequently have ranged as high as 6½ times such 1939 earnings. The System earnings available for interest since 1940 are as follows: 1940—$13,495,717 (P.R. II, p. 659); 1941—$30,607,244 (P.R. II, p. 659); 1942—$66,205,617 (P.R. II, p. 660); 1943—$47,717,858 (D.C.R., p. 28531); 1944—$47,833,479 (D.C.R., p. 28531); 1945—$34,257,324 (D.C.R., p. 28531); 1946—$30,369,166 (D.C.R., p. 28532); 1947—$32,946,964 (D.C.R., p. 28532); 1948—$40,707,556 (booked) (P.R. III, p. 775, Debtor's District Court approval hearing Exhibit No. 1); 1949 (strike year)—$28,925,182 (booked) (P.R. III, p. 775, Debtor's District Court approval hearing Exhibit No. 1); 1950—$45,595,589 (booked) (Alleghany Confirmation hearing Exhibit No. 1, Confirmation hearing transcript June 26, 1951, pp. 42-43).

Change in "Traffic Consist" Makes "Normal Year" Forecast Immaterial

15. The complete unreliability of the "Normal Year" forecast, even as revised in the Commission's Fourth and Fifth Supplemental Reports, to measure the earning capacity of the System for any year since 1941 or for

any future year, is indicated by the extent the "traffic consist" of the "Normal Year" would affect the earnings in any year since 1941, if applied to the total freight traffic for any such year. The "traffic consist" as herein used refers to the ratio existing between the total carload traffic for each of the five main commodity groups and the total carload traffic. As an example, if the "traffic consist" of the "Normal Year" were applied to the total 1950 carload traffic, subject to the rates and costs prevailing in 1950, the net revenue from railway operations would have been reduced $9,520,011 (see Appendix A) and the income available for fixed charges would have been reduced approximately $5,521,607. These figures, of course, are based on the assumption that the total cost of handling the same overall volume of traffic in 1950 would not vary materially.

16. This improvement in the System's earning power is largely due to a shift in the "commodity consist" to Manufactures and Miscellaneous, which generates a much higher net revenue than is generated by the other main Commodity Groups. The System's "Manufactures and Miscellaneous" *carload traffic* for 1950 amounted to 44.97% of its total 1950 carload traffic (Alleghany Confirmation hearing Exhibits Nos. 37A, B and C, Confirmation hearing transcript June 27, 1951, pp. 197, 205-206), as contrasted with the "Normal Year" forecast of 33.49% (P.R. I, pp. 774-775, Commission Exhibits Nos. 244, 245, 246, 247); and the System's *freight revenue* from "Manufactures and Miscellaneous" traffic for 1950 amounted to 54.25% of its 1950 total freight revenue (Alleghany Confirmation hearing Exhibits Nos. 37A, B and C, Confirmation hearing transcript June 27, 1951, pp. 197, 205-206), as contrasted with the "Normal Year" forecast of 41% (P.R. I, pp. 774-775, Commission Exhibits Nos. 244, 245, 246, 247).

The following table has been computed from a study by Delbert M. Steiner, Transportation Cost Analyst, Interstate Commerce Commission, published May 1951 by Association of Interstate Commerce Practitioners:

Over 200%	176 to 200	151 to 175	126 to 150	101 to 125	76 to 100	51 to 75	26 to 50	0 to 25	Below 0
100	100	100	82	72.5	74	57	28	31	7

The figures above the horizontal line represent the percentage ranges in which the different commodities are listed, based on the extent the revenue generated by each commodity is above or below out-of-pocket cost. The figures below the horizontal line show the percentage of the total number of commodities in each vertical column represented by commodities in the Manufactures and Miscellaneous Group. Although Mr. P. J. Neff, Chief Executive Officer of the Trustee (P.R. III, p. 30), could not give the percentage figures, in the Confirmation hearing, he verified that System traffic in commodities classified in the Manufactures and Miscellaneous Group was the most profitable (Confirmation hearing transcript June 27, 1951, pp. 182-184).

17. This change in the fundamental character of the System's traffic and earning power could not have been contemplated by Mr. Perkins and his associates when they prepared the "Normal Year" study, nor considered by the Commission when it issued its Fourth and Fifth Supplemental Reports, because the increase in the "Normal Year" forecast in these Reports was merely to compensate for the unanticipated traffic in citrus fruit and chemicals (D.C.R., pp. 28534-28539).

Economic Changes Make "Normal Year" Forecast Immaterial

18. After the Commission indicated in its Memorandum Brief filed in response to the Circuit Court's order of May 24, 1947 (P.R. IV, Circuit Court mandate) that the reduction in indebtedness, interest payments and other matters required a reconsideration of the 1944 Commission Plan then pending on appeal before the Court of Appeals for the Eighth Circuit, it was remanded and hearings before the Commission on new plans were commenced on 3/23/48. Statistics in respect of the System's financial, operating and physical condition were brought down to 12/31/47 (P.R. III, pp. 14-53, 136-137, 312, Commission Exhibits Nos. 940-975). A great mass of statistical information was introduced showing the vast economic improvement (in the nation as a whole and particularly in the region served by the System) since the depression year (P.R. III, pp. 143-152, 183, Commission Exhibits Nos. 985-997). The highlight of this testimony was that the nation as a whole at the time had almost recovered from the depression to its long-term growth trend "at a compound annual rate of 4.1% per year" (P.R. III, p. 148) and that the growth rate in the region served by the System had in general surpassed the growth rate of the nation as a whole (P.R. III, pp. 144-146).

Predictions of Dr. Theodore Yntema

19. Doctor Theodore Yntema, an eminent economist (P.R. III, pp. 137-143), whose standing has been equally recognized by the Government and private enterprise, testified *as to the stable and permanent nature of these economic advances and improvements* (P.R. III, pp. 143-157). His testimony was neither contradicted nor rebutted by any oral or documentary evidence. He expressed the

opinion, based on a documented study of long and short term economic statistics and trends, governmental policies in the field of banking, industry, labor and defense: (a) that economic conditions following World War I could not be used as a guide in anticipating economic trends after World War II (P.R. III, p. 154); (b) that he did not expect a repetition of the late depression conditions in the next 20 or 30 years (P.R. III, pp. 152-154) nor a price recession of more than 10% from the levels prevailing at the time he testified (P.R. III, pp. 155-156); (c) that the territory served by the System from 1940 to 1947 has had a more rapid industrial growth than occurred in the nation as a whole (P.R. III, pp. 144-146) and will share fully in the future industrial growth of the country (P.R. III, p. 149); (d) that the System's then reproduction cost less depreciation (exclusive of lands and rights and other pertinent elements of value) was approximately $800,000,000 (P.R. III, p. 160) and was not likely to fall and remain below $720,000,000 (P.R. III, p. 160); (e) that the System's reproduction cost less depreciation should measure its economic value, as defined in the Commission's Supplemental Report of 7/4/44 (P.R. III, p. 163), which was prepared with the benefit of this Court's opinions in the Milwaukee* and Western Pacific** cases; and (f) that his opinion as to the System's economic value was based on the testimony of the System's chief executive officer that 3% of the 1947 net operating income of all Class I railroads, with Federal taxes added back, accrued to the System with good prospects that it will obtain a higher percentage in the future (P.R. III, pp. 164-166, 44).

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* 318 U. S. 523 (1943).
** 318 U. S. 448 (1943).

Economic Changes Since 1947 Makes "Normal Year" Forecast Immaterial

20. Since the close of these hearings the economic statistics upon which the above testimony was predicated have been revised to the end of 1950 and show a vast and steady improvement in economic conditions. Space will permit only a sampling of what has occurred since the hearings in the spring of 1948. As contrasted with President Truman's January 1950 forecast of a national output of $300,000,000,000 within five years, the gross national product amounted to $72,193,000,000 in 1935 (Alleghany Confirmation Exhibit No. 15, Confirmation hearing transcript June 26, 1951, pp. 66, 74-75) when the "Normal Year" was in the process of compilation and amounted to only $91,339,000,000 in 1939 (Alleghany Confirmation Exhibit No. 15), just before the Commission issued its Original Report adopting the "Normal Year" as the measure of the earning capacity of the System. The gross national product for 1947 was $233,264,000,000 (Alleghany Confirmation Exhibit No. 15) and for the post-war years (1946-1950) averaged $247,765,000,000 (Alleghany Confirmation Exhibit No. 15), which was more than three times the average gross national product for the depression period 1931-1939. Even during the war years the gross national product did not approach the post-war years, the figures for the war years being: 1942—$161,551,000,000; 1943—$194,338,000,000; 1944—$213,688,000,000; and 1945—$215,210,000,000 (Alleghany Confirmation Exhibit No. 15). The historical high point of $279,800,000,000 was reached in 1950 (Alleghany Confirmation Exhibit No. 15). The national income follows almost a parallel course.

New and Expanded Industrial Development in the System's Territory from 1940 to 1950

21. The rate of expansion of *major industries* and the establishment of *major new industries* for the period 1948-1950 inclusive on the System's lines was even greater than in the period 1940 to 1947 inclusive. For the 8-year period 1940-1947, there was an annual average of 37 expanded industries involving an annual average capital investment of $56,206,734 (P.R. III, pp. 39, 136-137, Commission Exhibit No. 971). In contrast, during the 3-year period 1948-1950 there was an annual average of 141 expanded industries involving an annual average capital investment of $78,540,500 (Debtor Confirmation Exhibit No. 1, Confirmation hearing transcript June 26, 1951, pp. 21-22). For the 8-year period 1940-1947 there was an annual average of 281 new industries established involving an annual average capital investment of $76,217,240 (P.R. III, pp. 39, 136-137, Commission Exhibit No. 971). In contrast, during the three-year period 1948-1950 there was an annual average of 409 new industries established involving an annual average capital investment of $90,634,966. In appraising the significance of this industrial expansion on the System's lines, Mr. Neff in the March 1948 hearings said "Generally speaking, it shows enormous expansion of peacetime industry which is creating tonnage for transportation by Missouri Pacific Lines" (P.R. III, p. 38).

The Revised "Normal Year"

22. Although Mr. Neff did not attempt to forecast a normal year in the light of all the changes since 1936 (P.R. III, pp. 101-102, 106-107, 112-113, 129-132), he did testify that, if at the time the original "Normal Year" earnings estimate was made, the increase in citrus fruit and chemical traffic *alone* had been anticipated, the "Normal Year" estimate of income available for interest,

computed at rates, costs and other factors prevailing at that time, would have had to be increased to $26,622,731 (P.R. III, pp. 33-41). Except to this limited extent the "Normal Year" has never been revised and no revised "Normal Year" has ever been forecast. Nevertheless, the Commission merely added $3,390,948 to the "Normal Year" forecast of $22,059,052, making a total of $25,450,000 (D.C.R., p. 28545) and adopted the latter figure as the *"reasonable future normal year's earnings available for payment of interest after Federal income taxes"* (D.C.R., p. 28545). Since the earning factor upon which the Commission purported to rely in fixing the permissible maximum capitalization of the System in its Fourth and Fifth Supplemental Reports was the original "Normal Year" earnings figure merely revised to reflect the estimated increase in earnings due to the unanticipated increase in citrus and chemical traffic, it cast aside all reason and logic in arbitrarily reducing Mr. Neff's estimate by the sum of $1,172,731, since his estimate was the only evidence in the record upon which a judgment could be predicated. Thus, the Commission without a scintilla of evidence to support its action, not only arbitrarily discounted Mr. Neff's estimate, but completely ignored all the other undisputed evidence in the record as to the present and probable future increased earning capacity of the System.

Facts Bearing on Earning Capacity

23. If a reasonably concurrent relationship between the fundamental factors of cost, rates and earnings for any particular year or significant period is observed in considering the System's earning capacity, it becomes obvious that the System has never been afforded an opportunity to demonstrate the extent to which it can earn more than

a minimum reasonable return on the value of its property for rate making purposes, *which is its economic value* for the purpose of reorganization under the law.

Rates of Return on Assumed Values

24. The use of a cost index factor of 152 (the approximate average for the four-year period 1937-1940) would result in a System reproduction cost less depreciation, value of lands and rights and working capital of $540,096,823 as of 12/31/35, and this valuation may be fairly accepted to test the rate of return during the 13-year period 1928-1940, since the cost index factor during such 13-year period averaged 149.2 (see p. 8 hereof.) In only one year during this period did the rate of return on this valuation exceed 6% (P.R. I, pp. 333-334; P.R. II, pp. 658-659). The average was 3.065%. Included in the computation of the rate of return is the income from System investments which were valued by the Commission as of 12/31/47 at $73,498,933 (D.C.R., p. 28513), but were not considered in fixing the above valuation.

The cost index factor averaged 227.3 for the ten-year period 1941-1950 (see p. 8 hereof). The ultra-conservative valuation figure of $801,203,139, referred to in paragraph 10 hereof, was computed by applying the cost index factor of 227 prevailing in 1946. This figure, adjusted to reflect one-half the net additions and betterments for the 5-year period 1946-1950 instead of merely the net additions and betterments for the years 1946 and 1947, would amount to $833,880,902. Assuming that this figure represents a conservative average valuation figure for the 10-year period 1941-1950, the System earned more than 6% on this valuation in only one year—and that a war year—the average rate of return being 4.858%. As in the previous computa-

tion, the income from System investments (estimated value $86,269,666 as of 12/31/50, Independent Directors Confirmation Exhibit No. 3, Confirmation hearing transcript June 27, 1951, p. 276) is included, although the value of these investments is excluded from the valuation figure as well as the extraordinary amount of present net current assets.

Rates Have Not Been Increased Commensurate With the Rise in the Cost Index Factor.

25. Doctor Yntema testified that pre-war to the time he testified in March 1948, the rates have not risen proportionately with other prices (P.R. III, p. 175); that there has been no opportunity to find out how much the railroads could earn if they were given a reasonable opportunity (P.R. III, p. 182); that in his opinion they could earn an enormous lot more than they were permitted to earn at that time (P.R. III, pp. 163, 174-175, 182); and that he could not see how any public interest could conflict with the right of a railroad to earn a reasonable return on a fair value (P.R. III, pp. 181-182). No evidence was introduced to contradict this testimony.

After December 31, 1940 there were no freight rate increases until July 1, 1946, when the System was granted a general 6% increase but limited to a 3% increase on agricultural products (Confirmation hearing transcript June 27, 1951, p. 186). On January 1, 1947 a 20% increase went into effect, but this included the previous July increases of 6% and 3% (Confirmation hearing transcript June 27, 1951, p. 187). During this period from December 31, 1940 to July 1, 1946, no rate increases were granted, although the cost index factor increased approximately 50%. For the entire 10-year period 1941-1950 the System received overall freight rate increases of 59% (Confirmation hearing transcript June 27, 1951, p. 189)

as contrasted with an increase in the cost index factor of approximately 99%. There was thus a *complete lag* in the granting of increased rates during the first half of the period 1941-1950 and a serious overall lag in the last half of the period. The average rate per passenger per mile which was 3.09 cents in 1930 which decreased to 2.06 cents in 1935 and never again reached that figure until 1946 when it recovered to 2.15 cents, and then receded to 2.09 cents for 1948 and 1.99 cents for 1949 (Moody, Steam Railroads, 1940, p. 1636; 1950, p. 1084).

War Years Improperly Excluded from Consideration

26. The Commission excluded consideration of the System's earnings during the war years on the ground that they were extraordinary with little chance of repetition in peace times (D.C.R., p. 28553). This action was arbitrary because the only thing extraordinary about the earnings was that the large passenger revenue deficits in every year since 1929 turned into huge surpluses during the war years (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument). In 1944 this surplus amounted to $30,173,995 (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument). This startling change was not the result of any passenger rate increases to compensate for increased costs, but was entirely due to the heavy demand for passenger service which fortunately the System was prepared to handle. The post-war period has brought a return of deficits in passenger revenue. In 1949 the deficit was $13,383,297 (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument) and is not expected to be less than $10,000,000 in 1950 (Confirmation hearing transcript June 27, 1951, p. 155).

The freight revenue surplus during the war years was, therefore, not extraordinarily high if the relationship

between increased costs and rates then prevailing are properly evaluated. The extraordinary circumstance that, in a 20-year period, only the four war years showed a surplus from passenger revenue (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument), merely demonstrates how inadequate the freight rates were during these years, if the habitual losses from passenger traffic, which were incurred during most of the period, are substituted for the surpluses shown in the war years. The unique feature of the war years is the change in the habitual relationship between passenger and freight revenues and their respective contributions to the net earnings figures. For example, if the System passenger revenue loss anticipated to be about $10,000,000 for 1950 (Confirmation hearing transcript June 27, 1951, p. 155) is treated as an average for and is substituted for the passenger surplus revenue of $30,173,955 for 1944 (P. R. V, p. 51. See Exhibit handed up to Circuit Court on oral argument), the net revenues from railway operations would be reduced from $133,549,100 (D.C.R., p. 28531) to $93,375,145. After making proper tax adjustments the income available for interest would be reduced to approximately $36,000,000. This computed figure was generated from traffic other than passenger traffic and was due entirely to the extraordinary volume of freight traffic. It does not reflect any passenger or freight rate adjustment to compensate for increased costs. For example, the MOP in 1944 carried a freight tonnage of 61,173,323 tons (P.R. III, pp. 31, 136-137, Commission Exhibit No. 969, pp. 1 and 2), the second largest in its history, as contrasted with 50,750,850 tons (Alleghany Confirmation Exhibit No. 37A, Confirmation hearing transcript June 27, 1951, pp. 197, 205-206) in 1950. Similar computations for the other war years would produce relatively comparable results.

These computations conclusively demonstrate that not even the System's war earnings reflect the maximum

earning power of the System. For instance in 1950, when prevailing rates represented only a 59% increase (Confirmation hearing transcript June 27, 1951, p. 189) against a 99% increase in costs, when the System was sustaining the same passenger losses (Confirmation hearing transcript June 27, 1951, p. 155) assumed in making the above computations, when the volume of freight traffic was materially less, the System generated income available for interest, as adjusted for mail pay and cut-backs, in the amount of $41,103,581 (Confirmation hearing transcript, pp. 46, 307, 319, Group Confirmation Exhibit No. 1) as against the comparable 1944 figure, as above adjusted, of approximately $36,000,000.

Under conditions prevailing in 1950, subject to necessary tax adjustments, this 1944 freight surplus would amount to approximately $49,324,277, a 20% increase over 1950 earnings. From 1940 to the end of 1944 the cost index factor increased approximately 30%. If the System had been granted commensurate freight rate increases, this 1944 freight revenue surplus, subject to proper tax adjustments, would have amounted to approximately $46,800,000. In the interest of accuracy and fairness, however, it should be pointed out that the year 1944 presents the extreme example during the war years; but similar treatment of other war years would produce comparable results to a lesser degree.

In discarding the war years, the Commission not only overlooked their vital significance as evidence of the System's capacity operating under equitable freight rates, to increase its surplus from freight revenue in an expanding economy; but also completely disregarded their significance in demonstrating the extent to which the railroads are required to maintain passenger facilities to meet the Nation's necessities in normal as well as in crisis periods, and the extent to which the preparation for and the

rendering of this service affects the overall earning capacity of the System under a weighted average of normal and crisis conditions. The Commission, therefore, erred in discarding the war years, as factors, in determining the earning capacity of the System and fixing an inadequate capitalization.

If the System's earning capacity and its maximum capitalization are to be fixed on the assumption that it must continue passenger service after reorganization, the security holders as a minimum have a constitutional right to demand that the Commission consider, (a) the average weighted value of passenger revenue surplus in times of crises as well as deficits in normal times, (b) the effect increasing passenger rates commensurate with the rise in the cost index factor would have in decreasing deficits and increasing overall earnings, (c) the effect of promptly granting rate increases for other services equal to or even in excess of increasing costs, to compensate for passenger deficits, provided they cannot be eliminated by higher passenger rates. None of these matters has been considered and weighed by the Commission and until the earning statistics are thus evalued, they are worthless as a measure of the System's earning capacity.

Questions Presented

1. Were the findings and conclusions of the Commission as to the exclusion of the MOP common stock from participation in the reorganized company and as to the permissible maximum capitalization, the physical valuation and the earning capacity of the MOP System for reorganization purposes, supported by material evidence and reached by the application of proper statutory and Constitutional standards?

2. If it is established by undisputed evidence, in a reorganization proceeding under Section 77, that a bank-

rupt railroad over an extended period of time has not been and is not now being afforded an opportunity to earn a reasonable return on the reproduction cost, less depreciation, of its property devoted to the public use, because of the Commission's failure to grant rate increases reasonably commensurate with increases in construction costs and general prices during such period, may the Commission, for the purpose of determining its permissible maximum capitalization as reorganized and the extent of its security holders participation therein, limit its findings as to the railroad's earning capacity to an amount materially less than a reasonable return on the reproduction cost less depreciation, of its property devoted to the public use during such period, without violating the statutory and legal standards of Section 77 and the Fifth Amendment to the Constitution?

3. Did the Commission, in approving a consolidation, under Section 77 of the parent MOP and its subsidiary Gulf Coast Lines, apply proper statutory and Constitutional standards in limiting the maximum capitalization of the parent to an amount measured by its earnings, and of the subsidiary to an amount measured by its physical value, to reduce the overall consolidated capitalization and exclude the MOP common stock from any participation?

Reasons Relied on for the Allowance of the Writ

I. Reasons Why All Relevant Evidence Should Be Reviewed to Determine Whether the Conclusions of the Commission Were Supported by Material Evidence in Accordance with Statutory Standards.

It is believed that the Commission and the reviewing courts have defined and applied the term "material evidence" in connection with Section 77 contrary to applicable decisions of this Court. In any event this

Court should define the characteristics of the term as applied to Section 77, as it involves an important question of Federal law.

The evidence relied upon to support the Commission's conclusions as to the physical value and earning capacity of the System, which in turn were relied upon to support its conclusion as to the permissible maximum capitalization, was not material evidence under statutory standards or the standards applied in equity proceedings, because the conclusions reached were unreasonable and illogical when the facts relied upon to support them are tested by *"due consideration"** of *"all other relevant facts".** The findings of the Commission as to physical value and earning capacity do not purport to be and are not findings of fact. Relevant facts are not synonymous with material facts. The facts in support of the conclusions may be relevant in the sense of being admissible in evidence, but under the statutory standards they must be tested by "due consideration"* of "all other relevant facts"* to determine whether, after being so weighed and evalued, the conclusions reached are reasonable and logical. Conclusions based on a "due consideration"* of all relevant facts require a mental weighing and balancing of the facts in an appropriate or legal manner in order to reach reasonable and logical conclusions. If, after such a test of all the facts relevant to the issue, the conclusions are unreasonable or illogical, the particular facts relied upon to support the conclusions are not material under the statutory standards of Section 77 or the usual standards applied in equity proceedings.

The wording of subsections (b) and (e) of Section 77 of the Bankruptcy Act irrefutably support this analysis of the characteristics of material evidence necessary to support the conclusions reached. Subsection (b) requires

* Section 77(e) of the Bankruptcy Act.

"*due consideration* of the probable prospective earnings of the property in the light of its earning experience and all other relevant facts." (Italics added.) Almost identical phrasing is used in subsection (e). Subsection (c)(11) lends additional support by providing that reports of the Commission's agencies "shall be prima facie evidence of the facts therein stated" which implicitly requires a weighing and balancing of the evidential value of such a report and any evidence in rebuttal thereof in order to reach a reasonable and logical conclusion.

It is not believed that this Court intended to otherwise characterize material evidence in the following quotation from *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, page 473:

> "Congress apparently intended to leave the determination of valuation 'of any property for any purpose under this section' to the Commission. The language chosen leaves to the Commission, we think, the determination of value without the necessity of a reexamination by the court, when that determination is reached with material evidence to support the conclusion and in accordance with legal standards. It leaves open the question of whether in reaching the result the Commission had applied improper statutory standards."

In view of the fact, however, that Section 77, unlike subsequent legislation regulating the procedure of administrative agencies, failed to characterize the evidence which would sustain the conclusions of the Commission, the public and the security holders of the System and railroads in general are entitled to have this Court define the characteristics of material evidence by determining the extent the evidence in this case will reasonably and logically sustain the findings and conclusions of the Commission.

Space will not permit of a detailed analysis of all the vital evidence hereinbefore set forth in the Summary

Statement (hereinafter referred to as "S.S."). A few examples will suffice to establish that the Commission's conclusions were not supported by material evidence.

Physical Valuation Evidence

The Commission, in reaching its conclusions as to the physical value of the System, relied entirely upon the Report (P.R. III, pp. 448-512) of its Bureau of Valuation on the elements of value of the System as of December 31, 1945 (D.C.R., pp. 28510-28513; S.S. Par. 10). This report is, at best, only prima facie evidence. It is not a compilation or simple computation of facts as of December 31, 1945. It merely represents the opinion or, more accurately, the guess of the individual or individuals in the Bureau, who prepared it for the occasion, as to values they expect to prevail at some indefinite period in the future (P.R. III, pp. 468-469). The individuals who prepared the report were neither identified nor qualified on the witness stand as experts capable of analyzing or expressing an authoritative opinion on national and world economic and political conditions which are exerting and will continue to exert such a profound influence on values (P.R. III, pp. 511-512).

To be weighed and balanced to determine whether this prima facie evidence has the statutory characteristics of material evidence is the following evidence:

(a) The Railroad Construction Indices, which are purely mathematical compilations of fact, establish as a fact (1) that the overall valuation of the System as of 12/31/46 was in fact $801,203,139 as contrasted with the Commission's comparable valuation of $639,463,285 (S.S. Par. 10), (2) that the overall valuation of the System as of 12/31/50, would amount to $1,094,128,515, if properly computed on the Commission's formula adopted in Ex Parte 175 (S.S. Par. 11), (3) that the above valuation of $1,094,128,515

would have to be increased to $1,213,921,751, if the computations were actually based on the index cost factor of 284 prevailing in 1950 (S.S. Par. 8), (4) that the Commission's 1946 valuation applied in 1950 would result in a complete disregard of all increased cost factors after 1935, except to the extent recorded in the net additions and betterments, as is demonstrated by the fact that its 1935 valuation figures plus the net additions and betterments from 12/31/35 to 12/31/50 exceed the Commission's 1946 valuation by $58,905,956 (S.S. Pars. 9, 12).

(b) The enormous improvement in the condition and earning power of the System's properties due to the very large expenditures for additions and betterments and maintenance (S.S. Par. 12 (d)), particularly the expenditures for dieselization which, it is estimated, will produce an annual saving of $13,304,700 (S.S. Par. 12(d)).

(c) The factual and expert opinion testimony of one of the nation's most noted economists as to the permanent nature of prevailing non-agricultural prices and of the national growth trend which he predicted would not be interrupted for 20 or 30 years by a depression comparable to the era of the nineteen-thirties (S.S. Par. 12(e)).

Evidence as to Earning Capacity

The Commission's conclusion as to the System's future earning capacity was based solely on the inadequate revision (S.S. Par. 22) of the so-called "Normal Year" forecast, which even failed to reflect the full earning potential of the depression formula employed (S.S. Par. 13).

To determine whether this evidence has the statutory characteristics of material evidence as above defined, it at least must be weighed and balanced in connection with the following circumstances and facts:

(a) The reduction by the Commission of the revised "Normal Year" forecast to the extent of $1,172,781 with-

out a scintilla of evidence to support such a reduction of an already inadequate revised estimate (S.S. Par. 22).

(b) Mr. Perkins' opinion that 1930 and 1931 were approximately normal years and that there will be a steady growth in traffic after a normal year is reached (S.S. Par. 13).

(c) The earning statistics showing an increase of System earnings available for fixed charges from a low of $5,998,523 in 1935 to a peak of $66,205,617 during the war years and a top of $45,595,589 (booked) during the post war period (S.S. Pars. 13, 14).

(d) The unanticipated increase in the earning potential of the System due to the favorable shift in the "Commodity Consist" of the freight traffic handled by the System since 1935 when the "Normal Year" forecast was under preparation (S.S. Pars. 15, 16, 17) which earnings potential was given no weight by the Commission (S.S. Pars. 15, 16).

(e) The vast improvement in the economic condition of the country as a whole and the region served by the System since the depression years, typified by an increase in the gross national product from $72,193,000,000 in 1935 to $279,800,000,000 in 1950 (S.S. Par. 20), and by the steadily increasing rate at which old industries in the System's territory have expanded and new industries have been established (S.S. Par. 21).

(f) The factual and expert testimony of Dr. Theodore Yntema as to existing and future industrial economic and political factors which will prevent severe depressions in the future and insure a permanently expanding economy (S.S. Par. 19).

(g) The factual testimony that the System has not been afforded an opportunity, even in the war years, to demonstrate the extent it could earn more than a reasonable

return on the fair value of its physical property devoted to the public use, due to the inadequate adjustment of freight and passenger rates to rising costs (S.S. Pars. 25, 26), and the habitual losses incurred in furnishing necessary passenger service, except during the war years when the extraordinary volume of passenger traffic produced a surplus and obscured the inadequacy of the passenger and freight rates during this period (S.S. Par. 26).

The fundamental facts in the case are not in dispute. *The Commission's findings as to the System's physical value and earning capacity are conclusions.* These conclusions were, in turn, based on the conclusions of its Bureau of Valuation as to the System's normal year valuation and the completely discredited conclusions of the "Normal Year" earnings forecast. To the extent such conclusions are supported by any factual testimony, such facts must be tested by a "due consideration"* of "all other relevant facts"* to determine whether the conclusions reached and the results that flow from their application are reasonable and logical. If thus properly weighed and evalued, it is submitted that neither the materiality of the evidence relied upon nor the conclusions reached conform with the statutory standards or the standards imposed by Courts of Equity.

The undisputed factual background of this case makes the following quotation from *Irving Bank-Columbia Trust Co.* v. *Stoddard*, 292 F. 815, 821, particularly pertinent:

> "It is true that an equity court, taking charge of a receivership, should have great deference paid to its decision on a question of disputed facts, where the court has the opportunity to see the parties interested and their witnesses; but here there is no controversy on facts, and an appellate court is able to come to a sound conclusion as competently as the District Court."

* Section 77(e) of the Bankruptcy Act.

The following quotation from *New York Life Ins. Co.* v. *Simons*, 60 F. (2d) 30, 32, indicates that Appellate Courts in equity are not precluded from reviewing all the facts if the conclusions reached are unreasonable:

> "For an appellate court to hold that a finding of fact by a sitting justice in an equity case is clearly wrong, it is not necessary that there shall be no substantial evidence to support it; but, if it clearly appears to the appellate court that the great weight of the evidence is clearly contrary to the factual finding of the sitting justice, or the imprints of the sitting justice from proven facts is unreasonable, then his finding may be disregarded, and the appellate court determine the facts from the evidence before it, or may draw different conclusions from the facts found."

Since Section 77 imposes a duty on the Commission to weigh and evalue all relevant testimony to arrive at reasonable and logical conclusions and merely provides for judicial review without any restrictions, the courts of review are not merely permitted to review but are under a duty to review all relevant evidence to determine to what extent the Commission's findings are reasonable.

It is submitted that the reviewing courts made no such evaluation of all the relevant facts as is required by the legal standards of Section 77. That both the Commission and the reviewing courts in reality disregarded all the evidence introduced after its Original Report, dated January 10, 1940, is best evidenced by the small amount the System's capitalization was increased in its Fourth and Fifth Supplemental Reports, dated respectively August 2, 1949 and December 29, 1949.

If verbiage must give way to reality and substance, the Commission's action in increasing the capitalization of the System from $560,000,000 in its Original Report to $612,000,000 in its Fourth and Fifth Supplemental Reports,

merely amounts to capitalizing the "Normal Year" earnings forecast at a 3.6% rate in its Fourth and Fifth Supplemental Reports instead of the 3.9% rate used in its Original Report. This is the mere recognition of the lower composite yield on Railroad bonds prevailing during 1949, and leads inexorably to the absurd conclusion that the System's "*earning capacity*" is limited to the "Normal Year" earnings estimate.

Nothing more clearly demonstrates the degree to which the Commission and the reviewing courts departed from the statutory standards in weighing and evaluing all the relevant testimony, and reaching the conclusion that the MOP common stock should be eliminated from participation due to the maximum capitalization fixed.

II. Reasons for Reviewing the Commission's Conclusions as to the Earning Power of the System Upon Which It Based Its Maximum Capitalization for Reorganization Purposes.

The Commission and the reviewing courts decided this question contrary to applicable decisions of this Court. The Commission in its 1944 Report (257 I.C.C. 479, 522), which was decided after the decision of this Court in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523, adopted its earlier statement in *Chicago G.W.R. Co. Reorganization, 247 I.C.C. 193, 195* as establishing the proper legal criteria for determining the earning power of a railroad and its permissible maximum capitalization. The legal formula there stated, is as follows:

> "The value of railroad properties which we endeavor to determine within maximum limits for financial reorganization purposes is value in the strict economic meaning of that word. Briefly, it may be described as the actual worth of the properties to their owners, and basically it is dependent upon the present and prospective earning power of the prop-

erties, considering, among other things, the amount of business available, the competition which must be met in obtaining that business, and the character and condition of the facilities which make up the physical properties.

"For purposes of public regulation of rates and charges, the word value has come to be used, under the decisions of the United States Supreme Court, in another sense, known variously as 'fair value,' 'value for rate-making purposes,' and sometimes as the 'rate base.' It is the amount upon which the owners of the property are entitled, under the Constitution to an opportunity to earn a reasonable return, an opportunity of which they cannot be deprived by public regulation if confiscation is to be avoided. This amount is determined after giving consideration and weight principally to the original cost of the properties, the cost of reproduction of the portion capable of reproduction, the present value of land, and the extent to which the properties have depreciated.

"This latter so-called value may obviously, and ordinarily will, differ from value in the strict economic meaning of the word. Because of sparsity of business available or the competition of other carriers, for example, it may not be possible to earn a reasonable return upon 'value for rate-making purposes,' even if public regulation allows the carrier a free hand in the making of its rates and charges. In that event the economic value will be the lower of the two. On the other hand it may be the higher, if the carrier is so strategically located that it can earn more than a minimum reasonable return upon 'value for rate-making purposes' under public regulation, which must to some extent be based upon general transportation conditions."

The Commission in its Fourth and Fifth Supplemental Reports and the reviewing courts, in approving such reports, departed from the above standards.

The following quotation from *Bluefield Water Works & Improvement Company* v. *Public Service Commission,* 262 U. S. 679, 692, cited with approval in *United Railways & Electric Company* v. *West,* 280 U. S. 234, 250, establishes the legal and constitutional standard for fixing the rate and rate base of a public utility.

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; * * *"

This formula should be applied to the reproduction cost, less depreciation, of the property devoted to the public use. In this connection Dr. Yntema testified that in unregulated industries in which the volume of business is not declining, economic values tend to approximate reproduction costs (P.R. III, p. 166) and that, unless the railroads of the country are a dying industry, they can earn a reasonable return upon such reproduction costs (P.R. III, p. 163). That such reproduction cost is not excessive as a rate base for the System is established by the fact that the System's asset value as of December 31, 1950 was $936,235,940 (Alleghany Confirmation Exhibit No. 5) as against a reproduction cost, less depreciation, of $1,094,128,515, computed by applying the conservative formula used by the Commission in Ex Parte 175 (S.S. Par. 11).

Although railroads are a regulated industry, they are compelled to compete with unregulated industry for capital in order to survive and must be permitted to produce earnings commensurate with their economic value, which means that, subject to the relative risks involved, they

must be given an opportunity to produce earnings on the same basis as unregulated industry (P.R. III, p. 167). *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U. S. 679, 692, 693.

Petitioner contends that the interpretation of the opinion of Mr. Justice Douglas in the *Milwaukee* case, 318 U. S. 523, 541, as to the meaning of Section 77(e), which was urged upon the District Court and adopted by it (P.R. III, pp. 922-923), is erroneous. The phrase in Section 77(e) "in the light of its earning power", as interpreted by Mr. Justice Douglas, can only mean that "earning power" as the *primary criterion* must be tested by a consideration of the value of the railroad's property devoted to the public use, to determine whether the maximum capitalization fixed for reorganization purposes reflects *that opportunity* to earn a reasonable return, guaranteed by the Constitution, on such value. If the earning record indicates that such an *opportunity* has not been afforded, the permissible maximum capitalization for reorganization purposes may not be fixed at less than the reproduction cost, less depreciation, until the earning power, tested by such opportunity, can be definitely shown to be insufficient to support such a capitalization. *The Fifth Amendment to the Constitution is a restriction on the Government, not on the citizen.* It was this restriction on the power of the Government with which Mr. Justice Douglas was concerned when he used the following parenthetical phrase, "(apart from doubts concerning constitutional power to disregard them)" and the following clause, "except as they may indirectly bear on earning capacity." In holding that Section 77 intended to make "earning power" the primary criterion for fixing capitalization for reorganization purposes, he meticulously pointed out that the Constitutional restrictions on the Government's power to appropriate the property of its citizens must be honored.

It is submitted that this Court did not hold that maximum capitalization for reorganization purposes must be measured by a railroad's earning record without regard to the value of its property devoted to the public use or by an "earning power" necessarily restricted to a reasonable return on the value of such property. On the contrary, it is submitted, that this Court held that such capitalization must be measured by an "earning power" that adequately reflects an opportunity to earn a reasonable return on such a property valuation and *may be measured* by an "earning power" reflecting a higher return, if there is no showing that a capitalization so measured would be contrary to the public interest.

In the Circuit Court it was also contended that the opinion of Mr. Justice Douglas in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, had the effect of relieving the Commission from the necessity of considering valuation data either in a rate case or in a reorganization proceeding under Section 77. Petitioner is not prepared to lightly accept forced interpretations of opinions of this Court, which would in any way impair the safeguards contained in the Fifth Amendment to the Constitution. In so far as the opinion has any bearing on a railroad rate proceeding controlled by different statutory standards, it provides for testing the end results of the "rate-making process" by the same fundamental factors adopted in the *Bluefield Water Works* case, *supra*. These factors are set forth in the following quotation from the opinion in the *Hope* case at page 603:

> "The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests. Thus we stated in the *Natural Gas Pipeline Co.* case that 'regulation does not insure that the business shall produce net revenues.' 315 U. S. p. 590. But such considerations aside, the investor interest has a legitimate concern with the financial

integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. Cf. *Chicago & Grand Trunk Ry. Co.* v. *Wellman,* 143 U. S. 339, 345-346. By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital. See *Missouri ex rel. Southwestern Bell Tel. Co.* v. *Public Service Commission,* 262 U. S. 276, 291 (Mr. Justice Brandeis concurring)."

As a matter of fact, valuation data was considered and rejected as not predicated on fact and as too "conjectural and illusory" (*Hope* case, p. 597) the court stating at page 605, "The incongruity between the actual operations and the return computed on the basis of reproduction cost suggests that the Commission was wholly justified in rejecting the latter as the measure of the rate base." Thus all that Mr. Justice Douglas suggested by way of dictum at page 602, was that under the facts of the case the complaining party had the burden of showing, after the Commission had reached the end result, that the rate order was unjust and unreasonable in its consequences. Mr. Justice Reed, at page 623, so construed the suggestion. The opinions of Mr. Justice Jackson and Mr. Justice Frankfurter in searching for criteria to guide the Federal Power Commission in fixing "just and reasonable" rates in the case of public utilities faced with the problem of wasting assets, certainly did not suggest that the majority opinion requires the abandonment of the conventional criteria used in railway rate proceedings. (See pp. 627, 648; see also *Market Street R. Co.* v. *Commission,* 324 U. S. 548 at 567, 569.) In a railroad rate case the suggestion would

place a very onerous procedural burden on the complaining party but would not necessarily impair the constitutional rights of a party diligent in the protection of such rights. It certainly is not a repudiation of the doctrine set forth in the *Bluefield Water Works* case, *supra,* so essential for the protection of the citizen's constitutional rights.

The term "earning power" as used in Section 77(e) and as interpreted in the above opinions is not synonymous with the term "earning record". Because a railroad is a regulated public utility, a legal determination of its earning power and the value of its property must be predicated upon the assumption that the rates and other regulatory restrictions imposed are fair and just. The Commission thus has a duty to see that the railroad is not subjected to unjust rates or other regulatory restrictions which have the effect of denying to it an opportunity to earn, if it can, a reasonable return on its reproduction cost, less depreciation, or at least on the asset value of its properties devoted to the public use.

For reorganization purposes the measure of this opportunity must be tested by the "past, present and prospective" actions of the Commission. To avoid the predisposition of the Commission to sustain the propriety of the rates established by it from time to time and the validity of its interpretation of the railroad's earning record as the measure of its "earning power," it is imperative that the courts review the Commission's past actions in this respect and *independently determine whether the railroad's "earning record" is a fair estimate of its "earning power" "past, present and prospective".**

Whether Petitioner has the burden of proving that the rates established have produced unjust and unreasonable consequences, is immaterial, since Petitioner has sustained that burden. Petitioner has affirmatively proved by undisputed evidence that the rates established have not

* Section 77(e) of the Bankruptcy Act.

afforded the System an opportunity to earn on the average a reasonable return on the reproduction cost, less depreciation, of its property devoted to the public use or on even the book value of such property (S.S. Pars. 24, 25), although at times the earnings produced with inadequate rates show that the System has the facilities and capacity to earn a reasonable return on such a valuation of its property (S.S. Pars. 14, 26).

Petitioner has established by an analysis of all relevant evidence, that the Commission's conclusions as to the reproduction cost, less depreciation, of the System's properties and its earning power, upon which the Commission based the System's capitalization for reorganization purposes, do not accurately reflect the cost factors past, present or prospective or adequate rates in relation to such cost factors and are not supported by material evidence. (Reference is made to the discussion of Question 1.)

Specifically Petitioner has shown (a) that the failure to grant the System rate increases commensurate with the rise in the cost factors and prices generally between 12/31/40 and 12/31/50 seriously impaired the earning record of the System (S.S. Pars. 24, 25); (b) that the System's earnings record during the war years does not even reflect the maximum earning power of the System, because of the inadequacy of the rates under which it operated, and because of the unusual relationship then existing between freight and passenger traffic (S.S. Par. 26); (c) that the Commission in discarding consideration of the System's earnings record during the war years and in discounting the permanence of the post war earnings record, relied upon incomplete and distorted earnings statistics (S.S. Par. 26); and (d) that the Commission has made no attempt to compensate the System for the habitual losses incurred in rendering necessary passenger service by higher passenger rates or higher rates on other services (S.S. Pars. 24, 25).

This affirmative case, including all other relevant evidence, properly weighed and evaluated, requires the discarding of the Commission's conclusion as to the System's earning power, including the System's capitalization based thereon, because it fails to reflect that opportunity, past, present and prospective, for the System to earn a reasonable return on the value of its property devoted to the public use (based on either asset or reproduction cost, less depreciation), which is guaranteed by the Fifth Amendment to the Constitution, and sustained by the above decisions.

III. Reason for Reviewing the Inconsistent Standards Adopted by the Commission for Fixing the Capitalization of the Various Segments of the System.

The Commission and the reviewing courts decided this question contrary to applicable decisions of this Court. The discussion of the facts and conclusions with respect to Questions 1 and 2 apply in varying degrees to the Gulf Coast Lines as a separate segment of the System. The discussion need not be repeated here. It is sufficient to point out that any of the computations of reproduction cost, less depreciation, applied to the System (S.S. Pars. 10, 11), if applied to the Gulf Coast Lines will produce reproduction values sufficient to support a capitalization for the Gulf Coast Lines of approximately $12,500,000 to $34,500,000 in excess of the $83,700,000 permissible capitalization fixed by the Commission in its Fourth and Fifth Supplemental Reports (D.C.R., p. 28561). Therefore, the reproduction cost, less depreciation, of its properties are greatly in excess of an amount necessary to support a capitalization of its revised normal year earnings of $4,700,000 (D.C.R., p. 28545), as found by the Commission, at rates commensurate with those used by the Commission in capitalizing its normal year earnings for the System, *if this were required by the legal standards of Section 77.*

In this connection the District Court stated: "It is not a violation of the statute to regard reproduction cost new less depreciation as a maximum permissible capitalization" (P.R. III, p. 926). As pointed out at pages 41-42 this statement is erroneous, because it deprives the security holders of the Gulf Coast Lines of the right to have the value of their securities measured by its economic value.

The Commission capitalized its revised "Normal Year" earnings for the Gulf Coast Lines at 5.6%, for the MOP at 3.7% (P.R. III, p. 925) and for the System at 4.158%. The results produced are unreasonable and illogical as applied to the security holders of the Gulf Coast Lines, including the MOP.

Even if such conclusions were based on proper legal and statutory standards as applied to the reorganization of a single independent railroad, they nevertheless would be erroneous when applied to a reorganization which requires the consolidation of various profitable and less profitable subsidiary segments of a System. It is a departure from legal and statutory standards and unfair to the security holders, particularly the stockholders of the parent, to apply one formula to the profitable subsidiary so as to produce the smallest possible capital and another and different formula to the less profitable parent and subsidiaries to obtain an overall minimum capitalization for the consolidated system.

If the security holders of the MOP System and particularly the security holders of the parent are to be required to accept for their claims consolidated securities, they are entitled to insist that the Commission apply a consistent legal theory and formula which will balance in proper proportion the good and bad in each situation. Certainly, the System, which is not earning the fair return guaranteed it by the Constitution on the value of its properties devoted

to the public use, cannot be forced to discount the earnings of a profitable segment of its business when reproduction cost becomes the primary and paramount test and at the same time and in the same proceeding discount the reproduction cost of a less profitable segment when "earning capacity" becomes the test, under a forced consolidation for reorganization purposes. Such a double standard could not be used to establish the consolidated capitalization of private enterprises. It should not be used in a forced consolidation under Section 77 to fix the lowest possible consolidated capitalization of railroads and thereby exclude the MOP common stock from any participation. Such an application of double standards in the same proceeding does not comply with the legal statutory standards required by Section 77 and the Constitution.

Appraisal of Equity Premature

Petitioner recognizes that the extent of the value of the System's equity will depend upon a reappraisal of the case by the Commission after a correction of the errors pointed out. Any attempt to appraise this value at this time, therefore, would be premature.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding that court to certify and send to this Court, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case numbered and entitled on its docket, "No. 14270, Alleghany Corporation, Holder of Common Stock of Missouri Pacific Railroad Company,

Debtor, Appellant, vs. Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company, et al., Appellees," to the end that said cause may be reviewed and determined by this Court, that the judgment of said Court of Appeals entered August 14, 1951, be reversed and that Petitioner be granted such other and further relief as to this Honorable Court may seem just and proper.

Dated: January 11, 1952.

Respectfully submitted,

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APPENDIX A

Adjustment of 1950 Freight Revenues, Based on "Normal Year"
"Traffic Consist" or "Commodity Mix"
(Summary: Missouri Pacific System)

	Actual 1950 Freight Revenue	Adjusted 1950 Freight Revenue	Constructive Revenue Loss
Missouri Pacific Railroad	$198,275,958	$188,796,331	$9,479,627
Gulf Coast Lines	39,785,642	39,236,332	549,310
International-Great Northern	30,134,437	30,643,363	(gain) 508,926
Missouri Pacific System	$268,196,037	$258,676,026	$9,520,011

Adjustment of 1950 Freight Revenues, Based on "Normal Year"
"Traffic Consist" or "Commodity Mix"
(Gulf Coast Lines)

Group—	Cars Handled, 1950	Freight Revenues 1950	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
Agriculture	62,719	$ 7,954,171	110,369	$126.82	$13,996,997
Animals	4,992	326,052	16,983	65.31	1,109,160
Mines	90,494	6,662,536	84,695	73.62	6,235,246
Forests	24,336	1,751,034	18,835	71.95	1,355,178
Mfrs. & Misc.	163,055	22,101,581	114,714	135.55	15,549,483
Total	345,596	$38,795,374	345,596		$38,246,064
L. C. L.	....	990,268	....		990,268
Grand Total	345,596	$39,785,642	345,596		$39,236,332

*"Normal Year" Forecast Distribution:

Agriculture	31.936%
Animals	4.914
Mines	24.507
Forests	5.450
Mfrs. & Misc.	33.193

**Calculated from Alleghany Confirmation Exhibit 37B

ased on "Normal Year"
odity Mix"
e System)

ctual 1950 reight evenue	Adjusted 1950 Freight Revenue	Con-structive Revenue Loss
,275,958	$188,796,331	$9,479,627
,785,642	39,236,332	549,310
,134,437	30,643,363	(gain) 508,926
,196,037	$258,676,026	$9,520,011

Adjustment of 1950 Freight Revenues, Based on "Normal Year" "Traffic Consist" or "Commodity Mix"

(Missouri Pacific Railroad)

Group—	Cars Handled, 1950	Freight Revenues 1950	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
Agriculture	272,575	$ 34,761,304	368,535	$127.53	$ 46,999,269
Animals	59,092	6,389,068	109,392	108.12	11,827,463
Mines	336,361	29,124,581	328,808	86.80	28,540,534
Forests	136,448	13,216,754	207,320	96.86	20,081,015
Mfrs. & Misc.	665,255	106,125,637	455,676	159.52	72,689,436
Total	1,469,731	$189,617,344	1,469,731		$180,137,717
L. C. L.	....	8,658,614	....		8,658,614
Grand Total	1,469,731	$198,275,958	1,469,731		$188,796,331

*"Normal Year" Forecast Distribution:

Agriculture	25.075%
Animals	7.443
Mines	22.372
Forests	14.106
Mfrs. & Misc.	31.004

**Calculated from Alleghany Confirmation Exhibit 37A

ased on "Normal Year"
odity Mix"
)

t on	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
71	110,369	$126.82	$13,996,997
52	16,983	65.31	1,109,160
36	84,695	73.62	6,235,246
04	18,835	71.95	1,355,178
81	114,714	135.55	15,549,483
74	345,596		$38,246,064
68	....		990,268
42	345,596		$39,236,332

re 31.936%
..... 4.914
..... 24.507
..... 5.450
Misc. 33.193

37B

Adjustment of 1950 Freight Revenues, Based on "Normal Year" "Traffic Consist" or "Commodity Mix"

(International-Great Northern)

Group—	Cars Handled, 1950	Freight Revenues 1950	*Cars Handled, Adjusted	**Revenue per Car 1950	Freight Revenues Adjusted
Agriculture	57,864	$ 5,175,183	82,749	$ 89.44	$ 7,401,071
Animals	8,451	703,712	19,031	83.27	1,584,711
Mines	62,238	4,671,065	40,697	75.05	3,054,310
Forests	21,083	1,193,437	10,504	56.61	594,631
Mfrs. & Misc.	151,246	17,305,232	147,901	114.42	16,922,832
Total	300,882	$29,048,629	300,882		$29,557,555
L. C. L.	....	1,085,808			1,085,808
Grand Total	300,882	$30,134,437			$30,643,363

*"Normal Year" Forecast Distribution:

Agriculture	27.502%
Animals	6.325
Mines	13.526
Forests	3.491
Mfrs. & Misc.	49.156

**Calculated from Alleghany Confirmation Exhibit 37C

APPENDIX B

Comparison of "Normal Year" Statistics With Significant Periods In Reorganization Proceedings

Periods	No. Cars	Average Per Car	Freight Revenue	Income Available for Interest	
				Separate Cos.	System
Missouri Pacific Railroad Company et al.					
Average (1928–34)	1,109,956	$ 67.75	$ 75,199,265	$17,730,306	$21,206,172
1930	1,334,904	$ 67.80	$ 90,515,711	$24,742,258	$28,217,274
1931	1,079,518	$ 67.15	$ 72,491,510	$19,503,517	$23,321,317
Average (1930–31)	1,207,211	$ 67.47	$ 81,503,610	$22,122,887	$25,769,295
"Normal Year" Forecast	1,240,820	$ 64.50	$ 80,030,164	$16,886,318(1)	$20,412,204(1)
1939	947,350	$ 69.77	$ 66,100,673	$ 7,762,725	$10,097,423
1940	1,003,456	$ 69.09	$ 69,327,677	$11,276,729	$13,495,717
1950	1,469,731	$121.55	$178,659,336(3)	$35,928,237(2)	$45,595,589(2)
1950 % of (1928–34) average ..	132.41%	179.40%	237.58%	202.63%	215.01%
1950 % of (1930–31) average ..	121.74%	180.15%	219.20%	162.40%	176.93%
1950 % of 1939	155.14%	174.21%	270.28%	462.83%	451.55%
1950 % of "Normal Year"	118.44%	188.44%	223.23%	212.76%	223.37%
Gulf Coast Lines and Subsidiaries, Excluding I.G.N.					
Average (1928–34)			$ 11,330,573	$ 2,024,422	$21,206,172
1930			$ 15,203,748	$ 3,474,985	$28,217,274
1931			$ 11,576,712	$ 1,512,654	$23,321,317
Average (1930–31)			$ 13,390,230	$ 2,493,819	$25,769,295
"Normal Year" Forecast	187,847	$ 60.61	$ 11,386,310	$ 2,106,532(1)	$20,412,204(1)
1939	192,083	$ 67.77	$ 13,017,191	$ 2,559,256	$10,097,423
1940	191,017	$ 66.54	$ 12,710,339	$ 2,268,633	$13,495,717
1950	345,596	$107.94	$ 37,306,533(3)	$ 5,494,152(2)	$45,595,589(2)
1950 % of (1928–34) average ..			329.25%	271.39%	215.01%
1950 % of (1930–31) average ..			278.61%	220.31%	176.93%
1950 % of 1939	179.92%	159.27%	286.59%	214.67%	451.55%
1950 % of "Normal Year"	183.97%	178.08%	327.64%	260.81%	223.37%
International—Great Northern Railroad Co. et al.					
Average (1928–34)	204,178	$ 55.56	$ 11,365,227	$ 1,707,074	$21,206,172
1930	185,024	$ 58.09	$ 10,747,333	$ 1,122,435	$28,217,274
1931	252,315	$ 57.55	$ 14,519,911	$ 2,486,750	$23,321,317
Average (1930–31)	218,669	$ 57.82	$ 12,633,627	$ 1,804,592	$25,769,295
"Normal Year" Forecast	200,905	$ 53.41	$ 10,730,347	$ 1,419,354(1)	$20,412,204(1)
1939	157,867	$ 54.29	$ 8,570,137	$ 169,680 Red	$10,097,423
1940	162,561	$ 52.02	$ 8,456,029	$ 6,964 Red	$13,495,717
1950	300,882	$ 92.78	$ 27,918,026(3)	$ 4,258,700	$45,595,589
1950 % of (1928–34) average ..	147.36%	166.99%	245.64%	249.47%	215.01%
1950 % of (1930–31) average ..	137.59%	160.46%	220.98%	235.99%	176.93%
1950 % of 1939	190.59%	170.89%	325.75%	%	451.95%
1950 % of "Normal Year"	149.76%	173.71%	260.17%	300.04%	223.37%

(1) Before a total adjustment of $1,646,848 due to accounting adjustments not involving Perkins traffic and revenue estimates, making total System "Normal Year" $22,059,052 (Fourth Supplemental Report; District Court Record p. 28533; 239 I.C.C. 7 at 34-35, 91-92; Johnson Exhibit 242, 1936 Commission Proceedings).

(2) Before readjustments for mail pay, cut-backs, etc., referred to herein.

(3) Figures for freight revenue, number of cars and revenue per car were obtained from Commission Exhibit 969, except that the "Normal Year" figures were obtained from Commission Exhibits 242, 243, 244, 245, 246, 247 and 248 and 1950 figures were obtained from Group Confirmation Exhibits 2, 3 and 4. None of the figures include LCL freight.

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